(2)

No. 85-1798

Supreme Court, U.S.
FILED
MAY 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1985

PENNZOIL COMPANY,

Appellant,

–against–

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

THOMAS D. BARR
DAVID BOIES*
MAX R. SHULMAN
FRANCIS P. BARRON
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

PAUL J. CURRAN*
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Of Counsel.

Attorneys for Appellee
Texaco Inc.

May 31, 1986

*Counsel of Record

2 7 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.	v
STATEMENT OF THE CASE	1
ARGUMENT	9
A. The Second Circuit's Due Process Holding Does Not Merit Plenary Review	9
B. The Second Circuit's State Action Holding Does Not Merit Plenary Review	14
1. The Second Circuit's decision is well within *Lugar*	15
2. The Second Circuit's decision does not affect the Anti-Injunction Act	19
3. The Second Circuit's decision does not offend the constitutional policies that underlie the state action doctrine	19
C. The Second Circuit's *Younger* Holding Does Not Merit Plenary Review	21
1. The narrow federal relief at issue does not implicate a "vital" state interest	21
2. Texaco lacked a practical remedy in the Texas state courts	25
D. The Second Circuit's Subject Matter Jurisdiction Holding Does Not Merit Plenary Review	27
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
CASES:	
Archer v. Bill Pearl Drilling Co., 655 S.W.2d 338 (Tex. App. 1983)	16
Davis v. Scherer, 104 S. Ct. 3012 (1984)	14
Dennis v. Sparks, 449 U.S. 24 (1980)	17, 18, 19
Diamond v. Charles, 54 U.S.L.W. 4418 (U.S. April 30, 1986)	8
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	27, 28, 29
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	2
Douglas v. California, 372 U.S. 353 (1963)	10
Evitts v. Lucey, 105 S. Ct. 830 (1985)	7, 10, 11
Glen Oaks Util., Inc. v. City of Houston, 280 F.2d 330 (5th Cir. 1960)	16
Glenn v. Hollums, 73 S.W.2d 1068 (Tex. Civ. App. 1934)	27
Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)	29
Haring v. Prosise, 462 U.S. 306 (1983)	29
Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)	7, 13
Hernandez v. Finley, 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)	26
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	23, 29
Juidice v. Vail, 430 U.S. 327 (1977)	21, 23, 24, 29
Kantor v. Herald Publishing Co., 632 S.W.2d 656 (Tex. App. 1982)	16
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	10
Louisville & Nashville R.R. v. Stewart, 241 U.S. 261 (1916)	12
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	15, 16, 17, 18, 19, 20, 21
Mathews v. Eldridge, 424 U.S. 319 (1976)	11

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) 21

Migra v. Warren City School District, 465 U.S. 75 (1984) 29

Mitchum v. Foster, 407 U.S. 225 (1972) 22, 24

Moore v. Sims, 442 U.S. 415 (1979) 21, 22, 26

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 29

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 13

National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954) 12

Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. 1980) 27

Renger v. Jeffrey, 182 S.W.2d 701 (Tex. 1944) 16

Shell Petroleum Corp. v. Grays, 62 S.W.2d 113 (Tex. Com. App. 1933) 16

Svoboda v. Alexander, 3 S.W.2d 423 (Tex. Com. App. 1928) 27

Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985) 29

Williams v. Oklahoma City, 395 U.S. 458 (1969) 10

Younger v. Harris, 401 U.S. 37 (1971) 8, 21, 22, 24, 25, 26, 29

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Fourteenth Amendment . 1, 10, 18

STATUTES AND RULES:

United States

28 U.S.C. § 1254(2) 1, 14

28 U.S.C. § 1257 5

28 U.S.C. § 2283 .... 15, 19

28 U.S.C. § 2403(b) 1, 20

42 U.S.C. § 1983 .... 7, 18, 19, 20, 22

Fed. R. Civ. P. 62 5

	Page
New York	
N.Y. Civ. Prac. Law § 5519(c)	14
Oregon	
Or. Rev. Stat. § 19.045	14
Texas	
Tex. Civ. Prac. and Rem. Code § 65.013	27
Tex. Prop. Code Ann. § 52.001	2
Tex. R. Civ. P. 324	27
Tex. R. Civ. P. 364	1, 4, 5, 27
Tex. R. Civ. P. 627	1
Virginia	
Va. Code § 8.01-676.1	14

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S. A. Texaco Belgium N.V.
S. A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company
Canadian Reserve Oil and Gas Ltd.

Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

STATEMENT OF THE CASE

Pennzoil has appealed, pursuant to 28 U.S.C. § 1254(2), from a judgment of the United States Court of Appeals for the Second Circuit, affirming the grant of a preliminary injunction against application of certain Texas state security provisions on the ground that, in "the unique and extraordinary circumstances of this case" (A35), application of those provisions raises serious questions under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (A43-44).[1] The State of Texas, whose statutes are at issue, intervened as a party in the district court pursuant to 28 U.S.C. § 2403(b) and separately appealed to the Second Circuit (A4 n.1), but has not appealed to this Court.

Pennzoil's Jurisdictional Statement largely ignores the following *undisputed* facts which show why Texaco was compelled to seek relief in the federal courts and why that narrow relief was properly granted:

(1) On December 10, 1985, a trial court in Texas entered a money judgment against Texaco (the "Judgment") in the unprecedented amount of $11.12 billion (A6)—over 40 times larger than the largest private civil judgment ever upheld in any prior case of any kind.

(2) Under Tex. R. Civ. P. 364(b) and 627, a money judgment is enforceable by execution 30 days after entry (or, if a new trial motion is made, 30 days after its denial), unless the judgment debtor has secured a stay of execution by posting a supersedeas bond in "at least the amount of the judgment, interest and costs". (A8 & n.4, A86) The amount of the bond is fixed by law; Texas courts have no discretion to vary it. (A9-10)[2]

---

[1] Citations in the form "A___" refer to pages in the Appendices attached to Pennzoil's Jurisdictional Statement. Citations in the form "JS___" refer to pages in Pennzoil's Jurisdictional Statement.

[2] If a supersedeas bond is not posted, a writ of execution is obtained by *ex parte* application to the court clerk, the writ is presented by the judgment creditor to the county sheriff, and the sheriff executes it. (A25-26)

(3) Even if a supersedeas bond is posted, Tex. Prop. Code Ann. §§ 52.001 *et seq.* permits a judgment creditor to place liens upon a judgment debtor's real property in Texas immediately upon entry of judgment. (A25-26, A8-9; JS 2) There is no authority under Texas law for staying attachment of such judgment liens.[3]

(4) Under the bond provisions, to obtain a stay of execution of the Judgment pending appeal, Texaco would have had to post a bond in excess of $12 billion. (A8) Neither Texaco nor any other company could have posted such a bond since "the world-wide surety bond capacity ranges from $1 billion to $1.5 billion under the best possible circumstances". (A9)[4]

(5) Without a supersedeas bond, Pennzoil could have executed the Judgment, and the "attachment of a lien . . . on Texaco's real property in Texas, valued at $5 billion, would [have] seal[ed] the company's fate", forcing Texaco "into bankruptcy or liquidation". (A39-40) As a result, Texaco's ability to pursue an effective state court appeal from the Judgment—an appeal guaranteed by the Texas Constitution and raising serious questions under both the federal Constitution and state law (A42)—would have been destroyed. The damage caused to Texaco would have been "immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits". (A44)[5]

(6) Application of the lien and bond provisions would also have adversely affected the national economy and national

---

[3] Judgment liens are obtained by *ex parte* application to the court clerk, who furnishes an abstract of judgment which the judgment creditor delivers to county recorders in counties where the judgment debtor's real property is located. The county recorders then index and file the abstract, thereby perfecting the lien. (A25-26)

[4] Similarly, although Texaco has a liquidation value in excess of $22 billion (A39), it could not possibly have posted $12 billion in cash or cash equivalents and "still retain[ed] sufficient liquid assets to operate its business" (A9; *see also* A39); nor, because of the terms of its unsubordinated indebtedness, could it have possibly borrowed $12 billion by mortgaging or pledging its assets (A9).

[5] *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (the possibility of bankruptcy "[c]ertainly . . . meets the standard for granting interim relief, for otherwise a favorable final judgment might well be useless").

security.[6] The extent of the public harm threatened by premature enforcement of the Judgment was attested by the fact that "some 58 interested parties including 12 states . . . filed amicus briefs or other papers [in the Second Circuit] urging that enforcement be enjoined". (A40)

(7) Upon the consent of both Pennzoil and Texaco, Paragraph 7 was inserted into the Judgment, barring Pennzoil from enforcing the Judgment for the limited remaining time the trial court retained jurisdiction, so long as Texaco satisfied certain conditions.[7] Pennzoil refused to agree to further relief and took the position (correct under Texas law) that the court was powerless to give any relief without Pennzoil's consent. (A7, A8, A103)

(8) Despite Paragraph 7, in the week after entry of the Judgment Texaco's financial condition rapidly deteriorated, to the point that the company was driven to the brink of bankruptcy. (A10, A90-101)[8] Texaco's bonds were downgraded by

---

[6] If Texaco had been forced into liquidation or bankruptcy, a large percentage of Texaco's 55,000 employees world-wide, with an annual payroll of $1.6 billion, would have lost their jobs; and approximately 319,000 Texaco stockholders, who received $730 million in dividends in 1985, would have suffered heavy losses. (A40) In addition, "the inability of Texaco to function in a normal manner" would have "adversely affect[ed] this country's balance of payments", made "this country's oil supply less secure", impaired the "ability to supply military forces" around the world, and "could [have] prompt[ed]" other foreign actions "harmful to the national security or foreign policy of the United States". (A112-13)

[7] Under Texas procedure, the expiration of the trial court's jurisdiction (and, thus, of Paragraph 7's terms) could have occurred at the earliest on February 8, 1986, and at the latest on March 25, 1986. (A89)

[8] For at least two reasons, Paragraph 7 failed to stop Texaco's financial deterioration. *First,* lenders and suppliers knew that Paragraph 7 would expire in a short period of time, after which Pennzoil could attach or execute on Texaco's property. *Second,* there was reluctance to deal with Texaco because of uncertainty over whether particular transactions were permitted under Paragraph 7, which, *inter alia,* prohibited Texaco from engaging in transactions other than "in the routine and ordinary course of business". (A10, A90-101)

Pennzoil itself aggravated the situation by publicly threatening to undo whatever limited protection Paragraph 7 afforded. Specifically, Pennzoil's chairman warned that the company was " 'going to put pressure' " on the Texas trial court to permit attachment of liens unless Pennzoil was satisfied with Texaco's settlement proposals, and a Pennzoil director and "legal

Moody's from investment grade to non-investment grade; Texaco was forced to withdraw from the commercial paper market; banks with which it did business advised that they would no longer lend the company money on unsecured terms because of the "uncertainties" of Paragraph 7; potential joint venturers with Texaco cancelled negotiations because of similar uncertainties; suppliers refused to do business with the company on regular and customary terms; and companies refused to negotiate routine deals for the purchase of Texaco assets. (A10, A40)

(9) Because of the severity of Texaco's financial crisis, on December 13, 1985, Texaco requested an emergency conference with the Texas trial court. The trial court at first responded favorably, but later refused to hold a conference when Pennzoil objected. Pennzoil in fact took the position that it would never agree to such a conference. (A10, A101-02)

(10) Without Pennzoil's consent, the only other possible avenue of relief in Texas from application of the lien and bond provisions was a constitutional challenge brought on "by motion and mandamus". (A10) Such a challenge—uncertain at best[9]—could not have provided Texaco with "adequate and timely" relief. (A10, A37) When Texaco sought its federal injunction, "time [was] of the essence" (A35)—the company was literally within days of bankruptcy. To pursue mandamus in Texas would have required Texaco to expend "precious time" (A37)—time it did not have—requesting the Texas trial

---

strategist" charged Texaco with violating the "standstill" provisions of Paragraph 7 "by providing letters of credit from its bankers in purchasing products and services" —a clear threat to have the "standstill" lifted. (A46, A105)

[9] According to the State of Texas in the court below, for mandamus to lie, "[t]he applicant *must* have a *clear right* to the performance of the act requested" and "[t]he target of the writ *must* have a *clear duty* to perform the act". (Brief of the State of Texas, Intervenor-Appellant ("Tex. Br.") at 32 n.10; emphasis added) To the extent there was a "clear right" and "clear duty" here, it was the right of Pennzoil, under the mandatory provisions of Tex. R. Civ. P. 364(b), to execute its Judgment absent a full supersedeas bond, and the duty of the Texas state courts not to grant a stay of execution absent such a bond.

court, in the first instance, to disregard the plainly non-discretionary dictates of Rule 364(b); then filing a mandamus petition with the Texas appellate courts; if successful on that petition, engaging in further remand proceedings; and if unsuccessful, petitioning this Court under 28 U.S.C. § 1257. (A38)[10]

(11) Against the devastation which would have been caused to Texaco, application of the lien and bond provisions was wholly unnecessary to protect any legitimate Pennzoil interest. As the Second Circuit observed, "there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full". (A45-46)[11]

(12) Given Pennzoil's conceded lack of need for security and the conceded seriousness of the questions raised by Texaco's state court appeal, it is likely, as the Second Circuit

---

[10] The "stipulation" offered by Pennzoil *after* Texaco had instituted its federal suit—under which the Texas trial court would apply the standards of Fed. R. Civ. P. 62 in determining the security required of Texaco pending appeal (A129-30)—"d[id] not solve the problem Texaco face[d] in this action". (A48) The "stipulation" purported to confer upon the Texas trial court discretionary power that (a) the Texas legislature and appellate courts have expressly withheld, (b) the trial court had shown no inclination to use (in fact, had avoided even a conference to discuss), and (c) the Texas courts have no experience in exercising (indeed, as to which their entire tradition is to the contrary). (A48-49) Further, Pennzoil counsel represented to the district court that, if Pennzoil were to proceed in Texas under the "stipulation", it would insist on a bond equal to "the full value of the Judgment". (Transcript of Hearing before Hon. Charles L. Brieant, Jan. 9, 1986, at 64; *see also* A48) Had the Texas trial court not set such a bond, presumably Pennzoil would have appealed in the Texas state courts. As a result, the "stipulation" simply added to the financial and business community's justified apprehension and confusion over Texaco's continued viability.

[11] Texaco's appraised net worth as of December 31, 1984, was in excess of $22.6 billion; Pennzoil itself estimated that Texaco had assets far greater than necessary to satisfy the Judgment; Pennzoil's chairman publicly conceded that " 'he did not doubt Texaco's ability to pay the damages' "; and there was "no evidence that Texaco, a publicly held corporation, would seek to encumber its property other than as would be necessary in the normal course of business or that it would transfer any of its assets to defraud Pennzoil". (A46-47) Moreover, Pennzoil has *never* challenged the adequacy of the $1 billion bond set by the district court and has *never* sought to avail itself of the procedures explicitly established by that court (and approved by the Second Circuit) to increase the security if circumstances change. (A53-55)

noted, that "[Pennzoil's] pressure to apply the Texas lien and supersedeas bond requirements may, as Texaco charges, be motivated more by Pennzoil's understandable desire to obtain a favorable settlement of the Texas action than by genuine concerns about possible inability to collect if its judgment should be affirmed on appeal". (A46)[12]

From the above undisputed factual record, several points emerge which demonstrate why Pennzoil's appeal does not merit plenary review by this Court. None of those points is evident from Pennzoil's Jurisdictional Statement.

First, Texaco did not seek—and the courts below did not sanction—a constitutional requirement of "an affordable stay of judgment pending appeal". (JS i) The narrow ruling below is simply that when the application of lien and bond provisions, which are impossible for a judgment debtor to satisfy and unnecessary to protect any legitimate interest of a judgment creditor, prevents a defendant from effectively exercising a state guaranteed right to appeal, that application raises a due process

---

[12] Indeed, the same can be said of the motivation behind the instant appeal. On February 21, 1986, the day after the Second Circuit's decision, Pennzoil's chairman was reported in the *New York Times* as saying that "Pennzoil probably would not appeal the latest ruling", and that the result below was "a step in the right direction" (*New York Times,* February 21, 1986, section D at 1, col. 6); and he was reported in *The Wall Street Journal* as saying that the Second Circuit's affirmance did not "hurt [Pennzoil] at all" and "actually helps" (*The Wall Street Journal,* February 21, 1986, at 3, col. 2). In light of those statements, the only plausible explanation for Pennzoil's current appeal is to keep settlement pressure on Texaco.

And, Pennzoil's tactic appears immediately to have had its intended effect. On March 25, 1986—four days after Pennzoil filed its notice of appeal—*The Wall Street Journal* reported that Moody's, reversing its prior position, had decided that "a possible upgrading of Texaco's commercial paper rating will have to await the outcome of Pennzoil's court effort to have the standstill extended, as well as the outcome of its move to take the appeals court decision to the U.S. Supreme Court". (*The Wall Street Journal,* March 25, 1986, at 7, col. 1) The same day, *The Wall Street Journal* quoted Joseph D. Jamail, Pennzoil's lead counsel, as stating that "[a]ny banker that loans money to [Texaco] now is a lunatic". *Id.*

question sufficiently substantial to support a preliminary injunction.[13] Such relief is particularly warranted where, as here, the defendant's state court appeal presents serious challenges to the underlying judgment not only under state law, but under the laws and Constitution of the United States as well.[14] Pennzoil cites no case to the contrary.

Second, Texaco did not seek—and the courts below did not sanction—a rule which, for Section 1983 purposes, transforms into "the state" every state court judgment winner. (JS 10-11) State action is involved here not because Pennzoil was the "winning" party in Texas or because it obtained a judgment in the Texas trial court, but because, prior to final (and preclusive) adjudication of its claims, Pennzoil could invoke (and control) the unsupervised power of state officials to aid in the attachment, seizure and sale of Texaco's property, and because Texaco asks that this joint activity be enjoined on constitutional grounds.

Third, Texaco did not seek—and the courts below did not sanction—a result which amounts to review or modification of Pennzoil's Judgment or which ousts the Texas state courts from their unfettered ability to rule on the merits of the *Pennzoil v. Texaco* lawsuit. All the injunction below does is preserve Texaco's ability to pursue an effective appeal in the Texas state courts, and that appeal is moving forward right now.[15]

Fourth, Texaco did not seek—and the courts below did not sanction—interference with any on-going state court proceeding, and certainly not interference with a state court proceeding in which Texas has a "vital" interest sufficient to justify federal

---

[13] *See Evitts v. Lucey,* 105 S. Ct. 830, 838 (1985).

[14] *See Henry v. First Nat'l Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980).

[15] On April 23, 1986, Texaco filed its appeal brief in the Texas Court of Appeals challenging the Judgment on 90 separate state and federal grounds, based on both substantive and procedural errors committed by the Texas trial court. The appeal is scheduled for argument and submission on July 31, 1986.

court abstention under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971). Pennzoil's lawsuit against Texaco in Texas is a purely private dispute involving purely private parties, and the State of Texas expressly represented in the court below that it has "no interest in the outcome" of that dispute. (Tex. Br. at 2) Further, by its "stipulation", Pennzoil has purported to replace the Texas lien and bond provisions with *federal* procedures, thus suggesting that Pennzoil itself does not believe a "vital" state interest is implicated here. (JS 2, 17 n.10; A48)[16]

Fifth, the present action was filed in response to an imminent threat of irreparable harm to Texaco (and to the public interest) which could not have been averted by "adequate and timely" state court procedures. (A37) Under *Younger* itself, abstention is inappropriate in such exigent circumstances.

Sixth, the ruling below, far from creating a "yawning breach" (JS 6) or "capacious zone" (JS 7) or "ominous gap" (JS 16) in rules of federalism and comity, is extremely narrow. As the Second Circuit noted, the "extraordinary circumstances of this case . . . are unlikely ever again to recur". (A50) Those circumstances include: a concededly impossible bond requirement which local provisions gave state courts no discretion to modify or suspend; a conceded lack of need for security by the judgment creditor; the imminent destruction of a state guaranteed right to appeal in a purely private civil litigation raising serious federal and state issues; a putative state court mandamus remedy that was uncertain at best where no uncertainty could be tolerated; a request for federal relief which preserved rather than truncated state appellate power; and the distinct possibility that Pennzoil was deliberately threatening to use local officials and security procedures, not to make itself more secure as a judgment creditor, but to pressure Texaco to settle

[16] Moreover, as mentioned above, Texas has not separately appealed the Second Circuit's narrow ruling. *Compare Diamond v. Charles,* 54 U.S.L.W. 4418, 4421 (U.S. April 30, 1986).

the state court action prior to any appeal. (A46, A50, A105-106)[17]

ARGUMENT

None of the issues raised by Pennzoil merits plenary review by this Court. Accordingly, the ruling below should be summarily affirmed.

A. The Second Circuit's Due Process Holding Does Not Merit Plenary Review.

Because the Second Circuit's "narrow" ruling on Texaco's due process claim is correct in the "unique and extraordinary circumstances of this case" (A35; A50), it does not merit this

[17] By an amazing deluge of rhetoric, Pennzoil seeks to divert attention from what really happened below. Pennzoil accuses the Second Circuit of "opening a yawning breach in the walls of statutes and judicial doctrines" governing federal/state relations (JS 6); of "constructing a contrived complex of exceptions to . . . comity rules" (JS 7); of "creat[ing] a capacious zone within which comity is simply inapplicable" (JS 7); of "creat[ing] a no-man's land" within which comity rules are inoperative (JS 8); of creating "a jurisdictional darkling plain where litigants shanghaied from state courts clash by night" (JS 8); of "providing . . . a privileged entree" to federal courts for litigants wishing to "deliberate[ly] bypass" or "side-swip[e] on-going state court proceedings" (JS 8); of "drastically erod[ing]" and "cannibaliz[ing]" the Anti-Injunction Act (JS 12); of creating "a large and wholly unjustified zone" within which state proceedings can be enjoined (JS 12-13); of "creat[ing] a zone within which *all* rules of comity are rendered entirely inoperative" (JS 14; emphasis in original); of "creat[ing] an ominous gap in fundamental principles of comity" (JS 16); of "ma[king] nonsense of the law" (JS 14); of "gutt[ing]" the rules of abstention based on "a series of distrustful speculations" and "abstract and hostile speculations" (JS 16, 19); of "allow[ing] litigants to assemble jurisdictional sandwiches to suit their tastes" (JS 20); of "creat[ing] a looking-glass inversion of federalism" (JS 22); of "executing an end-run around the state courts" (JS 22); of "re-plac[ing] federal comity with an *anti*-comity principle" (JS 22-23; emphasis in original); of reaching a "topsy-turvy result" (JS 23); of opening the door to "wide-scale evasions of this Court's comity rulings" (JS 28); of offering litigants "a fielder's choice" between state and federal forums (JS 28); of giving litigants "free[dom] to roam across jurisdictional borders" (JS 29); and of "fundamentally alter[ing] the jurisdictional landscape" (JS 29). That onslaught of alarmist verbiage hardly describes the Second Circuit's decision.

Court's plenary review. Pennzoil ignores those circumstances—all of which are *undisputed.*

As Pennzoil would have it, the Second Circuit ruled that "a judgment debtor has a Fourteenth Amendment right to an affordable bond". (JS 5) Nothing the Second Circuit said or did justifies that sweeping characterization. On the contrary, the Court of Appeals' "narrow holding" (A35, A51) was carefully limited to a situation (1) where the posting of a mandatory $12 billion bond was "impossible" not just for Texaco, but for any judgment debtor (A35); (2) where the "inflexible" operation of a state's non-discretionary lien and bond provisions would render the judgment debtor's guaranteed right to appeal "an exercise in futility" by "irrevocabl[y]" destroying it prior to any appellate review (A24, A44); and (3) where the provisions' unmitigated application was "unnecessary" to protect the judgment creditor pending appeal and thus bore no rational relationship to the state's purpose in enacting them (A24, A34-35, A44).

Pennzoil concedes the controlling Fourteenth Amendment principle which mandates summary affirmance in these circumstances—that once a state such as Texas guarantees a right to appeal, "the Constitution foreclose[s] the option of limiting the right. . .by *irrational or arbitrary requirements*". (JS 24; emphasis added)[18] And yet, having paid lip service to this principle, Pennzoil utterly fails to explain why application of the lien and bond provisions in the circumstances of this case does not irrationally deprive Texaco of its right to appeal—an appeal raising "non-frivolous" federal and state issues (A42)—given the undisputed fact that such application is "unnecessary" to protect Pennzoil pending appellate review.[19]

---

[18] As this Court said just last term in *Evitts v. Lucey,* 105 S. Ct. 830, 838 (1985), "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms". *See also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-30 & n.5 (1982); *Williams v. Oklahoma City,* 395 U.S. 458, 459-60 (1969); *Douglas v. California,* 372 U.S. 353, 357-58 (1963).

[19] Pennzoil ignores this latter undisputed fact, which limits the scope of the Second Circuit's due process ruling. How often, for example, will a "'Mom-and-Pop' grocery store" (JS 27) be unable to post security for a

In an attempt to avert summary affirmance, Pennzoil offers several arguments, none of which is availing.

First, Pennzoil contends that "Texas has *not* limited Texaco's appeal rights" because the prosecution of an appeal in Texas is not expressly conditioned upon compliance with the state's supersedeas bond requirement. (JS 24; emphasis in original) That, of course, exalts form over substance. The court below found, as a matter of undisputed fact, that operation of the lien and bond provisions in this case would "render [Texaco's] right to appeal in Texas an exercise in futility" (A24)—a "meaningless ritual" —by "robb[ing] [it] of any effectiveness" (A43-44).

Second, Pennzoil contends that "there is nothing irrational in Texas' decision to safeguard fully the interests of those who have won judgments in Texas courts". (JS 25) But no one is arguing otherwise. Texaco's due process claim does *not* attack the *facial* validity of the lien and bond provisions and thus does *not* question that the state had a rational and legitimate purpose in enacting those statutes. Rather, Texaco's claim is that *application* of the provisions would be irrational in "the unique and extraordinary circumstances of this case" (A35), because Texaco's right to appeal would be eviscerated without advancing the state interest at issue (A34-35).

Third, Pennzoil contends that Texaco has already been accorded sufficient "due process" by the supposedly "full and fair" Texas trial which produced, by orders of magnitude, the largest civil judgment in United States legal history. (JS 23) But that argument ignores this Court's teaching in *Evitts* that once a state provides a right to appeal, that right cannot be limited or withdrawn without comporting with "applicable due process norms". 105 S. Ct. at 838. States such as Texas guarantee a right to appeal precisely because they recognize that trial court adjudication carries a significant "risk of an erroneous deprivation".[20] And here, as the Second Circuit

---

judgment but have assets so substantially in excess of the judgment that the judgment creditor itself publicly concedes that security pending appeal is *unnecessary*? In how many of *those* cases will local courts have *no* discretion to tailor security to need? *(See infra* at n.25)

[20] *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

found, it is "clear" that Texaco "has raised non-frivolous issues as the basis for its Texas appeal". (A42) It would be the height of irrationality if the interim and *unnecessary* enforcement of an *erroneous* trial court judgment irrevocably destroyed Texaco before the appellate courts had the opportunity to resolve its meritorious appeal.[21]

Fourth, Pennzoil contends that the Second Circuit's due process ruling "flies in the face of this Court's long-settled precedents". (JS 25-26) Yet, Pennzoil relies on only two cases to support its sweeping assertion (JS 24), and both are irrelevant.[22]

Fifth, Pennzoil contends that the Second Circuit's decision "threat[ens] ... the orderly administration of justice" in at least 30 states which purportedly have supersedeas bond statutes like Texas. (JS 26-27) But that dire forecast, obviously

---

[21] It is significant to note in this connection that the State of New York has recently filed an *amicus* brief in the Texas intermediate appellate court urging reversal of the Judgment on the ground that the Texas trial court's jury charge "substantially misstated the applicable New York caselaw". (Brief *Amicus Curiae* of the Attorney General of the State of New York, May 12, 1986, at 28)

[22] The issue in *National Union of Marine Cooks & Stewards v. Arnold,* 348 U.S. 37 (1954), was whether due process was violated by a state court dismissal of the defendant's appeal from a $495,000 judgment for flouting repeated court orders that he deliver $295,000 of out-of-state assets to a receiver for safekeeping pending appeal—the only substantial assets the defendant owned. In sustaining the appeal's dismissal, this Court held only that a state court has "inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution", and that "[w]here the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration". *Id.* at 44. That has nothing to do with this case, particularly given Pennzoil's conceded lack of need for security and the complete absence of any evidence that Texaco would unreasonably encumber or fraudulently transfer its assets pending appeal. (A46-47)

Equally irrelevant is *Louisville & Nashville R.R. v. Stewart,* 241 U.S. 261 (1916). All this Court held there was that a state could add 10% to the amount of a judgment *if affirmed on appeal* as the cost of the judgment debtor's obtaining a supersedeas bond which suspended execution pending appeal. *Id.* at 263. Since there was no claim in *Stewart,* nor could there have been, that that requirement effectively rendered the defendant's appeal meaningless, that case does not even remotely resemble this one.

made to interest this Court in plenary review, is based on Pennzoil's misstatement of the Second Circuit's holding that a judgment debtor is constitutionally entitled to "an affordable bond". The Second Circuit's "narrow" ruling (A35), expressly limited to a "unique" and "extraordinary" set of circumstances "unlikely ever to recur" (A35, A50), threatens no more disruptive effect on state supersedeas requirements than the Fifth Circuit's similarly "narrow" decision seven years ago in *Henry v. First Nat'l Bank of Clarksdale,* 595 F.2d 291, 301 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980). (A51)[23]

There is no indication that any of the states whose interests Pennzoil purports to be championing agrees with its doomsday prediction. On the contrary, nine of those states filed *amicus* briefs in the Second Circuit "urging that enforcement [of Pennzoil's judgment] be enjoined". (A40)[24] Alabama's position is illustrative:

> "The State of Alabama, like the State of Texas, has a supersedeas bond requirement and judgment lien statute, the purpose of which is to protect judgment creditors during the pendency of appeals, should they ultimately prevail. However, in this case, the unmitigated application

---

[23] In *Henry,* the Fifth Circuit held that where state law security provisions threaten to impair vital federal rights and interests by precluding meaningful appellate review of state court tort judgments, the federal courts can act to enjoin the state court plaintiff from invoking those security provisions, thereby preserving the right of state court and Supreme Court review and protecting the federal interests implicated. The narrow federal relief granted in *Henry* gave this Court an opportunity to undertake meaningful review of the local substantive law at issue there. Ultimately, this Court struck down that law, as applied, on the ground that it impermissibly burdened federally protected conduct. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982).

Like *Henry,* the present case involves a Judgment that, Texaco argues on appeal in Texas, will punish and deter conduct that federal constitutional and statutory law protects and encourages. Here, as in *Henry,* local lien and bond provisions threatened immediately to make that deterrent effect permanent and irrevocable by precluding meaningful state (and, if necessary, Supreme Court) review of the serious federal issues raised by the Judgment. Here, as in *Henry,* the federal courts possess both the power and the obligation to prevent such an intolerable result.

[24] The nine states are Alabama, Alaska, Delaware, Kansas, New Mexico, New York, Oklahoma, Washington and Wyoming.

of such provisions will destroy a judgment debtor before it has a meaningful opportunity to seek vindication through the state appellate system. We believe that an appropriate balance must be struck.

"We respectfully submit that [the district court] did just that in assuring Texaco's right to a meaningful appeal while providing Pennzoil with adequate security under Rule 65(c). It is no affront to state sovereignty for a federal court to guarantee a state court litigant a meaningful right to pursue its state court remedies." (Brief of Amicus Curiae The State of Alabama In Support of The District Court Preliminary Injunction, dated January 30, 1986, at 4-5)[25]

In sum, the Second Circuit's due process ruling does not merit plenary review by this Court.[26]

B. The Second Circuit's State Action Holding Does Not Merit Plenary Review.

Pennzoil contends that the Second Circuit's state action holding (1) "radically expands" the state action principles of

---

[25] It should also be noted that Pennzoil's 30-state head count is inaccurate. To begin with, Pennzoil itself admits that 16 of those jurisdictions "explicitly allow[ ] the trial court some equitable discretion to reduce the size of the bond". (JS 26 n.17) Three of the remaining fourteen states which Pennzoil counts as having non-discretionary full bonding requirements in fact expressly authorize courts to reduce the bond. (New York, N.Y. Civ. Prac. Law § 5519(c); Oregon, Or. Rev. Stat. § 19.045; Virginia, Va. Code § 8.01-676.1) These nineteen states, then, stand in marked contrast to Texas which, as the Second Circuit found, has a supersedeas requirement that is non-discretionary on its face and has "repeatedly been declared by Texas courts to be mandatory. . .". (A9)

As for the other eleven so-called non-discretionary jurisdictions, four have no reported decisions interpreting their supersedeas statutes as either discretionary or non-discretionary (Iowa, Arkansas, Michigan, Minnesota); and of the final seven states four appeared below as *amici* in support of the preliminary injunction against Pennzoil (A3; Alabama, Delaware, New Mexico and Oklahoma).

[26] Under 28 U.S.C. § 1254(2), the due process ruling is the *only* matter before this Court on direct appeal. As for the other issues raised by Pennzoil, this Court "retains discretion to decline to consider [them]". *Davis v. Scherer*, 104 S. Ct. 3012, 3017 n.7 (1984). For the reasons set forth in the remainder of this motion, those other issues do not merit this Court's consideration.

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (JS 10); and (2) "eviscerates" the Anti-Injunction Act (JS 9). Both contentions lack merit.[27]

1. **The Second Circuit's decision is well within *Lugar*.**

This Court's state action holding in *Lugar* turned on the presence of two factors. *First*, this Court relied on the presence of a "procedural scheme created by ... statute" that was "obviously ... the product of state action". 457 U.S. at 941. The specific scheme was a security procedure that balanced competing claims to disputed property pending trial by allowing attachment of property under certain circumstances. *Second*, this Court relied on the fact that, by invoking the state security provisions at issue, a private party triggered (and controlled) action by state officials. 457 U.S. at 941-42. As this Court explained, "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment". *Id.* at 941.

In finding state action in the instant case, the Second Circuit relied on precisely the same two factors that were dispositive in *Lugar*. *First*, as in *Lugar*, there is here a procedural scheme created by statute that is obviously the product of state action. (A24) That scheme (described *supra* at 1-2) involves security provisions which, through attachment and supersedeas mechanisms, balance competing claims to disputed property pending appeal. *Second*, as in *Lugar*, a private party's invocation of the security provisions here would have triggered (and allowed the private party to control) action by state officials. (A25-26)

Pennzoil does not—and cannot—dispute that both *Lugar* and the decision below were based upon these same two predicates. Instead, Pennzoil contends that *Lugar* is not controlling here because it involved security provisions that operated pending resolution through *trial* of competing claims

[27] Significantly, Pennzoil did not see fit to argue the state action issue before the district court.

to disputed property, whereas the security provisions here operate pending resolution of such claims through *appeal.* (JS 10) Under Pennzoil's reading of *Lugar,* invocation of precisely the *same* security provisions—involving precisely the *same* kind and extent of official action—would properly involve state action pending initial adjudication through trial, but could never involve state action pending appeal, even though a judgment at that stage is non-final under state law and is subject to corrective review.[28]

Pennzoil is wrong. Pennzoil relies on three elements in *Lugar* which it claims are unique to the prejudgment context. In fact, each element is present here as well.[29]

First, Pennzoil stresses that the security procedures in *Lugar* allowed seizure of "*disputed* property". (JS 10; emphasis in original) That is no less true here. The state's decision to provide a process of appellate review—a decision that contemplates the need to correct error committed in the initial phase of adjudication—demonstrates that a live and important "dispute" continues with respect to the property at issue.[30]

---

[28] Texas law accords judgments no finality or preclusive effect until all appeals have been exhausted. *E.g., Glen Oaks Util., Inc. v. City of Houston,* 280 F.2d 330, 334 (5th Cir. 1960); *accord Archer v. Bill Pearl Drilling Co.,* 655 S.W.2d 338, 341 (Tex. App. 1983).

[29] Pennzoil also overlooks the fact that state action arising from invocation of a local security scheme can support a Section 1983 claim only when (as in *Lugar* and here) that claim challenges the constitutionality of the particular scheme (either on its face or as applied). *Cf. Lugar,* 457 U.S. at 941. Because of this required nexus, the state action ruling below, contrary to Pennzoil's assertion, cannot be used in other contexts to support "imaginative constitutional objections" to other "state procedural and structural rules governing the processing of litigation". (JS 8-9; *see also* JS 11, 28)

[30] It is precisely for that reason that Texas courts attribute to post-trial security procedures the underlying purpose of maintaining "the status quo". *Renger v. Jeffrey,* 182 S.W.2d 701, 702 (Tex. 1944); *Kantor v. Herald Publishing Co.,* 632 S.W.2d 656, 657-58 (Tex. App. 1982); *Shell Petroleum Corp. v. Grays,* 62 S.W.2d 113, 118 (Tex. Com. App. 1933). If, as Pennzoil claims, completion of what is only the *initial* phase of adjudication (when, under Texas law, judgments are non-final and non-preclusive) in fact suffices to "determine[ ] the relevant rights and liabilities" of the parties—so that the property at issue is no longer "disputed" (JS 10-11)—there would be no reason to maintain "the status quo".

Second, Pennzoil stresses that invocation of the security procedures in *Lugar* was "judicially *un*supervised". (JS 10; emphasis in original) That is also true here. The very thrust of Texaco's due process claim is that Texas law prevents trial courts from exercising *any* discretion or supervisory power over the invocation of security provisions pending appeal—and that trial-winners (such as Pennzoil) who have no need for security may therefore employ those provisions to preclude effective review on a wholly arbitrary basis.[31]

Citing *Dennis v. Sparks,* 449 U.S. 24, 28 (1980), Pennzoil contends that the Texas security procedures would not have been "judicially unsupervised" in this case, because attachment and execution would have come at the end of a "4½ month trial", involving "the independent judgment of the state judiciary". (JS 11 & n.5)[32] That proposition misses the point of the limited constitutional claim at issue here. The "independent [judicial] judgment" the Texas trial court exercised during the "4½ month trial" was confined to adjudicating the merits of Pennzoil's state law claims. In the present lawsuit, Texaco does not attack that "independent [judicial] judgment"—Texaco is doing that on appeal in Texas (and, if necessary, in this Court

---

[31] In fact, the Texas security procedures at issue in the instant case are *more* judicially unsupervised than the Virginia procedures at issue in *Lugar.* As this Court observed, under the Virginia statute, upon the *ex parte* filing of an affidavit alleging need, the petitioner's property was "sequestered ... although it was left in his possession", and "a hearing on the propriety of the attachment and levy was later conducted". 457 U.S. at 924-25. The attachment would be vacated by the state court upon a failure "to establish the statutory grounds for attachment". *Id.* at 925. In contrast, the Texas security procedures relating to money judgments make no provision for any pre-attachment showing of need, for any judicial review of need—either before attachment or after—or for any possibility of judicial vacatur upon a failure to establish need.

[32] In *Dennis,* this Court held that " 'merely resorting to the courts and being on the winning side of a lawsuit' does not make a private party into a state actor under § 1983". (JS 11) As the Second Circuit observed, *Dennis* bars such Section 1983 claims because:

> "in such case[s] the *independent judgment* of the state judiciary is called into play, and unless unusual circumstances are shown ... a private party cannot be charged with responsibility for a judicial decision." (A27-28; emphasis added)

by direct review from the Texas Supreme Court). The issue in the instant case is whether—given Pennzoil's conceded lack of need for the particular security provisions involved—Pennzoil should nonetheless be permitted to invoke those provisions to preclude corrective review. That is a question which the initial trial court adjudication of Pennzoil's claims could not (and did not purport to) address. Pennzoil overlooks this dispositive distinction.[33]

Third, Pennzoil stresses that the seizure of property prior to initial resolution of competing claims thereto involves the exercise of "awesome" power which should be subject to federal constitutional constraints. (JS 10) But the power, through seizure of property, arbitrarily to truncate the process of review that ultimately will determine the property's rightful ownership—the power at issue here—is no less "awesome" or deserving of constitutional limitations.[34]

The presence here of all elements that Pennzoil contends were essential to *Lugar* only makes clearer that this case falls well within the scope of that decision.[35]

---

[33] A different case might be presented if, contrary to fact, the Texas lien and bond provisions allowed for judicial discretion with respect to the need for security for money judgments and if, in the independent exercise of that discretion, a Texas court had denied Texaco relief from the provisions. In such circumstances, invocation of the provisions by Pennzoil would have been judicially supervised. That, however, is plainly not this case.

The above is also a complete answer to Pennzoil's suggestion that "the Second Circuit's theory" would allow federal lawsuits requesting "additional argument time before the Texas Court of Appeals" (JS 21 n.14) or stays pending appeal from state injunction decrees (JS 28 n.19). The constitutional problem involved in the instant case arises only in the rare circumstance—not present in the cases Pennzoil suggests—where state courts lack inherent equitable discretion to grant the desired relief.

[34] Indeed, this Court has expressly held that the exercise of state power to preclude an appeal as of right must be and is subject to the constraints of the Fourteenth Amendment. (*See supra* at 10 n.18) As this Court observed in *Lugar,* Section 1983 "creat[ed] a remedy as broad as the protection that the Fourteenth Amendment affords the individual". 457 U.S. at 934.

[35] Pennzoil misconstrues the point of this Court's observation in *Lugar* that its holding was "limited to the particular context of prejudgment attachment". 457 U.S. at 939 n.21. (JS 10) The observation was made in specific response to a suggestion that *Lugar* altered the rule in *Dennis* that a private party does not become a state actor merely by instituting or prevailing

2. **The Second Circuit's decision does not affect the Anti-Injunction Act.**

Pennzoil contends that the Second Circuit's holding so expands the Section 1983 exception to the Anti-Injunction Act, 28 U.S.C. § 2283, that it "drastically erodes", indeed "cannibalize[s]", the Act. (JS 12)

Pennzoil is wrong. A ruling that a particular private party is a state actor has *no* impact on the breadth of the Section 1983 exception to the Anti-Injunction Act. If a state proceeding deprives the state court defendant of federally protected rights, thereby creating a *meritorious* Section 1983 claim, the state court defendant can always institute a Section 1983 injunction action against the state officials involved in the proceeding (who are clearly state actors under Section 1983), rather than against the private state court plaintiff. Such an action would not be barred by the Anti-Injunction Act, even if the private state court plaintiff were *not* itself deemed a state actor.

3. **The Second Circuit's decision does not offend the constitutional policies that underlie the state action doctrine.**

Under the decisions of this Court, the state action inquiry is guided by considerations of whether the private party charged "may *fairly* [be held responsible as] a state actor".[36] Whether imposing that responsibility is "fair" cannot be determined without assessment of the precise burdens such responsibility entails. Once that inquiry is undertaken, it is clear that the

---

in a state court litigation. The only limiting principle responsive to that suggestion turns on the distinction between (a) claims that attack the use by private parties of unsupervised security procedures to seize disputed property (which *Dennis* did not address, but which are present here and in *Lugar*), and (b) claims that attack attempts by private parties to employ the judicial process to resolve disputes (which *Dennis* forbids). It does not turn on the pre-trial vs. post-trial distinction that Pennzoil seeks to attribute to *Lugar*. The *Dennis* bar applies with equal force in both the pre-trial and the post-trial context. That is, critical to *Lugar's* limitation is the element of unsupervised attachment of disputed property, and not whether the attachment is pre-judgment or post-judgment.

[36] *Lugar*, 457 U.S. at 937 (emphasis added).

instant case, far from "expand[ing]" *Lugar* (JS 10), is significantly narrower than *Lugar* itself.

First, this is solely an injunction action, not a suit for damages. As the dissent in *Lugar* noted, it may be unfair to impose *damages* under Section 1983 where the only conduct charged is a private party's wholly innocent invocation, without notice or fault, of a seemingly valid state statute.[37] That concern, however, is not implicated where (as here) injunctive relief alone is sought. The only consequence of losing an injunction suit is that the federal defendant will be unable to invoke either an unconstitutional state statute or an otherwise constitutional state statute in an unconstitutional manner. That is hardly an unfair "burden". Moreover, unlike a damages award, it is a "burden" to which the private party would be no less subject even if the only available defendant were a state official.

In addition, fairness concerns may arise in damages actions because the threat of monetary loss leaves a private defendant charged as a state actor with no choice but to assume the burdens of defense.[38] Actions limited to injunctive relief do not pose such a threat.[39]

Second, in the instant case, unlike *Lugar,* the private party's invocation of state procedures would not have been wholly innocent or unwary. Pennzoil repeatedly disclaimed the need for security for its Judgment (*see supra* at 5 n.11), and was certainly aware that application of the lien and bond provisions would have had an irrevocably destructive impact on Texaco. Hence, Pennzoil's only reason for resorting to the local security provisions would have been to preclude appellate review. That fact readily distinguishes this case from others in

---

[37] 457 U.S. at 956 n.14 (Powell, J., dissenting).

[38] *See id.*

[39] Even where state officials are not initially named as defendants in an action challenging the particular application of a state statute, federal law requires that the state be notified and invited to intervene. 28 U.S.C. § 2403(b). The private defendant can then reap the benefits of defense without assuming any of the corresponding burdens. In the rare case, the state may determine that it should *not* defend the particular application at issue. However, where (a) a specific application of a statute is attacked as unconstitutional, (b) the state itself acquiesces in that attack, and (c) the private defendant's sole motivation for defending application of the statute is the desire to procure its benefits—rather than the need to avoid monetary liability—the "burdens" of defense are hardly unjustified.

which the private party invokes a "seemingly valid statute" wholly unaware that an infringement of rights may result.

In sum, the instant case falls well within *Lugar*. It certainly offers no reason to reassess this Court's settled state action doctrine.

C. The Second Circuit's *Younger* Holding Does Not Merit Plenary Review.

Pennzoil claims that the Second Circuit's decision "repudiates" the abstention doctrine this Court has developed under *Younger v. Harris*, 401 U.S. 37 (1971). (JS 13) In fact, the decision below merely declines to expand *Younger* in a manner unjustified by the "unique" and "extraordinary" circumstances of this case—including the fact that the limited federal relief preserves, rather than undermines, state court appellate power.

1. The narrow federal relief at issue does not implicate a "vital" state interest.

Under this Court's decisions, *Younger* abstention is warranted only when a state court action seeks to vindicate "vital state interests".[40] In each case decided under *Younger*, this Court has focused on the particular subject matter of the state court litigation—carefully explaining why that subject matter did in fact embody especially important public interests.[41] That repeated focus by this Court has made clear that the mere *pendency* of a state court proceeding—as opposed to the particular *subject matter* of the proceeding—does not supply the "vital" state interest required to justify abstention.

Pennzoil's lead *Younger* argument ignores this basic distinction. Pennzoil argues that it is a "contradiction in terms" to hold both (a) that state action is present (as necessarily is true any time some judicial action is taken in a pending state court lawsuit) and (b) that *Younger* absention is not warranted. (JS

---

[40] *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

[41] *E.g., Middlesex County Ethics Comm.*, 457 U.S. at 434-35; *Moore v. Sims*, 442 U.S. 415, 434-35 (1979); *Juidice v. Vail*, 430 U.S. 327, 335-36 & n.12 (1977).

14) That is so, Pennzoil contends, because state action under Section 1983 requires "the exercise of public power" and because the presence of such "*public* power" must itself trigger *Younger*. (JS 14; emphasis in original) Thus, according to Pennzoil, whenever state action exists for Section 1983 purposes, there is a "vital" state interest for *Younger* purposes. (JS 15).

Pennzoil in fact has things reversed. In the present context, a private party is considered a state actor for Section 1983 purposes only when the state has ceded to him the power to invoke and control, in an unsupervised manner, the conduct of state officials. That is *inconsistent* with a finding of a "vital" state interest. Under Pennzoil's theory, the less control the state exercises and the more control it abdicates to private parties, the more "vital" its interest.

If Pennzoil's argument were correct—and it is not—it would automatically extend *Younger* to " 'every pending proceeding between a State and a federal plaintiff' ", a result "not remotely suggest[ed]" by this Court's prior decisions[42]—indeed, it would, contrary to Pennzoil's disclaimer (JS 14 n.8), automatically extend *Younger* to all " 'purely' private" civil state court lawsuits.[43] Pennzoil's theory would also (a) mechanically bar relief, under *Younger,* in every Section 1983 action, thereby significantly eroding *Mitchum v. Foster,* 407 U.S. 225 (1972); and (b) render inexplicable this Court's careful focus in each *Younger* decision on the particular subject matter of the state court litigation—as opposed to the mere pendency of the proceeding.

Pennzoil next contends that the state interest at issue here—the interest of the State of Texas "in the functioning and enforcement of its bond and lien laws"—falls within the class of "vital" public interests triggering *Younger* abstention. (JS 15)

---

[42] *Moore v. Sims,* 442 U.S. 415, 423 n.8 (1979).

[43] That is so because, as mentioned above, judicial action taken in such lawsuits inherently involves "the exercise of public power". Under Pennzoil's theory, that "exercise of public power" itself mandates application of *Younger.* (JS 14)

To support that contention, Pennzoil relies on this Court's decision in *Juidice v. Vail,* 430 U.S. 327 (1977). Pennzoil, however, seriously misconstrues the holding of that case.

In *Juidice,* the federal plaintiff had been arrested and incarcerated pursuant to a state court order of contempt rendered against him after he (a) had ignored a court-ordered subpoena requiring him to attend a deposition; and (b) had ignored a further court order requiring him to appear to explain his failure to obey the subpoena.[44] Rather than respond to the contempt order, the federal plaintiff brought a federal challenge to the state debt collection procedure, which included the deposition and contempt citation he had ignored.

This Court ruled that federal abstention was appropriate in those circumstances. Pennzoil suggests that the Court did so because it recognized that the collection of private debts amounts to a "vital" state interest. (JS 15) Pennzoil is wrong.

The Court in *Juidice* could not have made it plainer that the focus of its opinion—the "vital" state interest involved—stemmed from the use of the contempt process itself (and *not* from the particular private interest that contempt happened to serve).[45] The *Juidice* federal plaintiff had been the object of two state court orders and had violated both. Contempt was the state's method of punishing him. As this Court said, the federal plaintiff had committed " 'an offense to the State's interest . . . as great as it would be were this a criminal proceeding' ".[46]

Pennzoil has thus confused the particular private interest that contempt in *Juidice* served with the process of contempt

---

[44] 430 U.S. at 329.

[45] 430 U.S. at 335-36 & n.12. It is, of course, clear why contempt proceedings implicate vital state interests. The contempt power enforces the principle that dissatisfied litigants must challenge state judicial action by lawful process rather than through private disobedience. No principle is more central to the integrity of the state's judicial function.

[46] *Juidice, supra,* 430 U.S. at 336 (quoting *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 604 (1975)).

itself.[47] If a federal court may properly enjoin the *entry* of judgment in a state court proceeding, as undoubtedly it may under *Mitchum,* a federal court surely cannot be barred *per se* from enjoining ancillary statutes governing the timing and terms on which state court judgments are to be secured.[48]

Certain additional unusual and distinguishing features of this case underscore the illogic of finding a "vital" *Younger* interest here.

First, unlike any *Younger* case in this or any other court, here the narrow federal relief does not interfere with "the regular operations of [the state's] judicial system". (JS 15, quoting *Juidice,* 430 U.S. at 355.) In every case requiring *Younger* abstention, the federal plaintiff sought to stop an ongoing state proceeding in its tracks. The narrow federal relief at issue here achieves the very opposite result. That relief was sought (and is required) to enable the state litigation to continue to completion *within* the state system. That relief advances the same interest that every *Younger* case has sought to protect.

Second, unlike any *Younger* case in this or any other court, "[h]ere the state [of Texas] has no interest in the underlying [state court] action" (A34), and explicitly so stated in the court below (Tex. Br. at 2). Neither Texas nor any Texas state agency is a party to the *Pennzoil v. Texaco* lawsuit. "It is a suit between two private parties stemming from the defendant's alleged tortious interference with the plaintiff's contract with a third private party. An injunction here does not prevent any arm of the state from acting to vindicate a state policy or to punish an infraction of state rules." (A34)

---

[47] *Juidice* itself placed no weight on the private debt collection function advanced by contempt there. This Court described the debt collection function as involving "purely private concerns", and contrasted the state's vital interest in contempt with those private interests in aid of which contempt may sometimes be invoked. 430 U.S. at 336 n.12.

[48] Pennzoil is, therefore, flatly wrong when it characterizes the decision below as holding that "federal injunctions may be granted entirely without comity constraints" whenever the federal defendant is a private party. (JS 15-16) Had the Second Circuit thought that *Younger* could not apply to a private federal defendant, it would have had no reason to consider whether the particular subject matter at issue embodied "vital" state interests adequate to trigger *Younger.*

Third, unlike any *Younger* case in this or any other court, here the only state that could arguably have a "vital" interest in application of the local security provisions—the State of Texas —was a party below but has not itself appealed.

Fourth, unlike any *Younger* case in this or any other court, here there is no claim that the narrow federal relief at issue has in any way compromised the asserted state interest in securing judgments. Pennzoil itself has conceded that it does not need liens or a bond to be secure. (A45-46)

Fifth, unlike any *Younger* case in this or any other court, here the state plaintiff (and federal defendant) has purported "by stipulation" to *waive* the local security statutes—the statutes it asserts embody "vital" state interests—and replace them with *federal* procedures. (JS 2, 17 n.10) That purported waiver suggests that even Pennzoil itself does not believe that the local provisions evidence a "vital" state interest. Nor can Texas have a "vital" state interest in application of the federal procedures.

2. Texaco lacked a practical remedy in the Texas state courts.

Even if a "vital" state interest were present here—and it is not—Pennzoil could not satisfy the second requirement for *Younger* abstention: that there be an adequate and timely remedy for the federal plaintiff within the state court system. Pennzoil contends that, absent an absolute "procedural bar" under local law, *Younger* abstention is required. (JS 16-20) In the circumstances of this case, that contention is nonsense. Where, as here, the threat of great and irreparable harm creates a *de facto* bar to state court relief, it is of no consequence whether there be a *de jure* bar.[49] Under Pennzoil's theory, Texaco would have been required to pursue its Texas state remedies until it was irreparably damaged merely to demonstrate that those remedies were inadequate and untimely. Such a requirement cannot be—and is not—the law.

---

[49] This, of course, is not to suggest that the substantive constraints on state court mandamus in Texas would not have amounted to a *de jure* bar in this case. (*See supra* at n.9) They readily could have.

Nothing in *Moore v. Sims,* 442 U.S. 415 (1979), upon which Pennzoil relies, is to the contrary. In *Moore,* this Court explicitly reaffirmed that "extraordinary circumstances" render *Younger* inapplicable when necessary to prevent "great, immediate, and irreparable harm" to the federal plaintiff.[50] Nowhere in *Moore* does this Court suggest that a state procedural scheme that is at best uncertain in its ability to grant relief to a party faced with imminent irreparable injury provides "an adequate opportunity to raise . . . constitutional claims".[51]

Contrary to Pennzoil's assertion, the Second Circuit did not engage in "abstract and hostile speculations about the effectiveness and timeliness of the state's remedial system". (JS 19) Rather, the Second Circuit's opinion rests on (a) the uncontroverted fact that "absent injunctive relief, enforcement of Texas' lien and supersedeas bond provisions would rapidly produce a catastrophe of major proportions, causing substantial harm to Texaco itself and to thousands of others throughout the United States including stockholders, customers, and suppliers" (A39); (b) the uncontroverted fact that when Texaco sought federal relief on December 17, the company's viability was measurable in *days;* and (c) the uncontroverted fact that "[i]f resolution of [Texaco's] claims [was] to be effective, prompt judicial action [was] essential; time [was] of the essence" (A35).

It was in the context of these uncontroverted facts that the Second Circuit correctly concluded that, given the exigencies and imminent threat of Texaco's destruction, the uncertainty[52]

---

[50] 442 U.S. at 432-33.

[51] 442 U.S. at 430. This Court's reliance in *Moore* (442 U.S. at 425-26 n.9) on *Hernandez v. Finley,* 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez,* 440 U.S. 951 (1979), demonstrates that a practical (albeit not *de jure*) bar suffices to suspend *Younger.* In *Hernandez,* the state security statutes at issue provided for some process and did not impose an absolute procedural bar to the federal plaintiffs raising their constitutional challenge to the security statutes. 471 F. Supp. at 519. The federal court found only that it was "uncertain", "unlikely" and " 'more theoretical than real' " that the state courts would ever address those constitutional claims. *Id.* at 519-20. Based on that finding, the court held that *Younger* did not apply, because the state procedures did "not afford a plain, speedy, efficient and certain remedy for review of [the plaintiffs'] federal claim". 471 F. Supp. at 520. Here, the security statutes provide for *no* process and the only arguably available means of attacking their application was the extraordinary remedy of mandamus, uncertain at best (*see supra* at n.9), and not even suggested in *Hernandez* to be adequate. (A36-37)

[52] *See supra* at 4-5 & n.9.

of the state court mandamus remedy arguably available to Texaco made that remedy inadequate. (A35-38) Only in the rare case (such as this one) where uncertainty cannot be tolerated does uncertainty equate to inadequacy.[53]

Pennzoil's argument, when reduced to its essence, is that Texaco was required to bear the risk of uncertainty and delay within the Texas state court system—no matter how crushing the resulting burden. That is not now—and should not become—the law.

D. The Second Circuit's Subject Matter Jurisdiction Holding Does Not Merit Plenary Review.

Relying principally on this Court's decision in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), Pennzoil argues that, simply because Texaco could have made its due process challenge in the Texas state courts, the federal courts are ousted from subject matter jurisdiction over that claim. (JS 7-8, 20-23) Nothing in *Feldman* (or any other case Pennzoil cites) supports that remarkable contention.

---

[53] Pennzoil cites a single Texas case—*Pace v. McEwen,* 604 S.W.2d 231 (Tex. Civ. App. 1980)—in support of its claim that Texas remedies would have been adequate and timely. (JS 18 n.11) In fact, *Pace* shows just the opposite. In *Pace,* the Civil Court of Appeals was able to exercise its injunctive power because the relator had already perfected his appeal. *Id.* at 232. To have perfected an appeal in mid-December, Texaco would have had to waive its new trial motion—which was timely filed on January 9, 1986, and which, under Texas procedural rules (Tex. R. Civ. P. 324), was an absolute prerequisite to preserving issues for appeal. Moreover, the judgment at issue in *Pace* was for recovery of specific real property. 604 S.W.2d at 232. Texas courts have *no* discretion with respect to the minimum bond for a money judgment but are granted *full* discretion with respect to the minimum bond to supersede a judgment for specific property. Tex. R. Civ. P. 364(c). Pennzoil cites no case—and we are aware of none—in which a Texas court enjoined execution of a money judgment, pending appeal, in the absence of a full supersedeas bond.

Pennzoil further asserts that under Tex. Civ. Prac. and Rem. Code § 65.013, the trial court would have had power to stay enforcement of the Judgment pending appeal. (JS 18-19 n.11) Pennzoil is wrong. The cases construing the statutory predecessor to § 65.013 make clear that where an opportunity for direct review of a money judgment exists, or where a supersedeas bond has not been posted, an injunction enjoining execution of judgment will not issue. *See Glenn v. Hollums,* 73 S.W.2d 1068, 1071 (Tex. Civ. App. 1934); *Svoboda v. Alexander,* 3 S.W.2d 423, 424 (Tex. Com. App. 1928).

Feldman reaffirmed the established proposition that a federal district court lacks power to engage in "appellate review" of a state court judgment. Under *Feldman,* a federal court engages in such "appellate review" when it adjudicates claims that a state court has already decided or that are "inextricably intertwined" with—that is, seek modification or reversal of—the state court's decision.[54]

Feldman's holding has no application here. As the Second Circuit found, and as Pennzoil concedes, Texaco's due process challenge to the lien and bond provisions was never presented to—far less adjudicated by—a Texas state court. (A21-22; JS 2, 7-8, 20) Nor, as the Second Circuit held, is that claim "inextricably intertwined" with the subject matter of any prior state court decision. (A22-23) The only claim the Texas trial court addressed was Pennzoil's state law claim of tortious inducement. The merits of that tort claim—and the trial court's disposition of it—have nothing to do with the reasonableness or validity of application of the lien and bond provisions. Conversely, Texaco's due process challenge to those provisions does "not call into question the validity of the underlying judgment" of the Texas court. (A27) The validity of the Judgment is something which is now being challenged on appeal in Texas —an appeal made possible precisely because of the limited federal relief granted below.[55]

---

[54] 460 U.S. at 476, 482-84 n.16, 486. The claims in *Feldman* illustrate this narrow principle. In *Feldman,* two applicants for admission to the District of Columbia bar, whom the highest court there had determined in a judicial proceeding to be ineligible, asked the federal court to order the District of Columbia appellate court to allow them to take the bar examination or to admit them to practice. 460 U.S. at 468-69, 472-73. One applicant relied on constitutional claims that had been raised and rejected in the local court. The other applicant relied on claims that could have been, but were not, raised in the local court. This Court held that both litigants' claims were barred—the former claims because they had been actually decided by the local court; the latter claims because they were "inextricably intertwined" with the local court's decision since, if accepted, they would have required reversal of that decision. 460 U.S. at 486-87 & n.18.

[55] The short-lived and uncertain prohibition against enforcement contained in Paragraph 7 of the Judgment in no way constituted a state court determination with respect to the reasonableness or validity of the lien and bond provisions as applied. As the Second Circuit noted, Paragraph 7 was simply the product of a "consent" agreement between Pennzoil and Texaco. (A7)

Pennzoil relies on this Court's statement in *Feldman* that "[b]y failing to raise his [constitutional] claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court". (JS 22, quoting from 460 U.S. at 484 n.16) That misses the point. The forfeiture referred to in *Feldman* can occur only when the constitutional claim seeks modification or reversal of the state court decision. The claims in *Feldman* plainly sought such reversal. The claims here plainly do not.[56]

Pennzoil's reliance on *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), is also misguided. Pennzoil argues that, under *Huffman*, state court defendants must raise in state court all federal claims connected in any way with the state proceeding. (JS 21-22) But *Huffman* was a *Younger* case, and its limitation on the defendant's choice of forum applies only where—unlike here—the state proceeding implicates a "vital" *Younger* interest. (*See supra* at 21-25) This Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), makes clear that that limiting feature of *Huffman* cannot be ignored. In *Moses*, this Court reaffirmed the "virtually unflagging obligation" of the federal courts to exercise their concurrent jurisdiction without regard to the pendency of the federal plaintiff's claims in a parallel state action.[57]

In sum, Pennzoil is wrong in contending that, so long as a federal constitutional challenge can be raised in an on-going state proceeding, that avenue is a litigant's "sole recourse". (JS 20) As the Second Circuit correctly held, Pennzoil's argument turns "settled law" on its head. (A22)

---

[56] For the same reason, Pennzoil is wrong in asserting that the decision below is in "conflict" with the Fifth Circuit's rulings in *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986) and *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985). (JS 21 & n.13) In both those cases, the federal court lawsuit asserted claims that sought modification or reversal of a prior state court decision.

[57] 460 U.S. at 15. Far from supporting Pennzoil's reading of *Feldman*, *Huffman* actually undermines it. If Pennzoil were correct about *Feldman*—and it is not—this Court wasted its time deciding the abstention issue in both *Huffman* and *Juidice v. Vail*, since there would have been no subject matter jurisdiction over the Section 1983 claims in those cases to begin with. For the same reason, under Pennzoil's reading of *Feldman*, federal courts would not have jurisdiction to make the res judicata inquiries mandated by this Court's decisions in *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984) and *Haring v. Prosise*, 462 U.S. 306 (1983).

CONCLUSION

Involved here is the validity of state security provisions challenged, not on their face, but only as applied to "the unique and extraordinary circumstances of this case" (A35) which "are unlikely ever again to recur" (A50). The result of the narrow ruling below is to assure that state judicial processes go forward to completion, rather than being arbitrarily terminated by interim and unnecessary enforcement of a judgment that is neither final nor preclusive, that is still subject to corrective review and reversal, and that raises serious questions under both federal and state law. Moreover, the private party that is here championing the local security provisions has conceded that it in fact does not need security for its judgment, has publicly threatened to use the local provisions to apply settlement pressure so as to avoid any appellate review, and has purported to "waive" the local provisions and replace them with federal procedures.

Such a narrow and unusual case does not merit plenary review. For the reasons stated above, this Court should summarily affirm the result below.

Respectfully submitted,

THOMAS D. BARR
DAVID BOIES
MAX R. SHULMAN
FRANCIS P. BARRON
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

PAUL J. CURRAN
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Of Counsel.

Attorneys for Appellee
Texaco Inc.

May 31, 1986